FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. [redacted] 127

THE SEVEN UP COMPANY,
Petitioner,

vs.

CHEER UP SALES COMPANY OF ST. LOUIS, MISSOURI, a Corporation; AMERICAN SODA WATER COMPANY, a Corporation, and ORANGE SMILE SIRUP COMPANY, a Corporation,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OLIVER T. REMMERS,
1730 Boatmen's Bank Building,
St. Louis 2, Missouri,
Counsel for Respondents.

DOUGLAS B. REMMERS,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 1271.

THE SEVEN UP COMPANY,
Petitioner,

vs.

CHEER UP SALES COMPANY OF ST. LOUIS, MISSOURI, a Corporation; AMERICAN SODA WATER COMPANY, a Corporation, and ORANGE SMILE SIRUP COMPANY, a Corporation,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

This is the second attempt of the petitioner to have this court review this case.

WRIT SHOULD BE DENIED.

I.

There is no conflict in the decisions of the other Circuit Courts of Appeals with that of the Eighth Circuit. The difference is that of expression and not of substance. Petition does not comply with Rule 38 of this Court.

II.

The law is established by a long line of decisions that a petition for leave to file a bill of review is not a matter of right, but is addressed to the sound judicial discretion of

the appellate court and should be decided upon considerations addressed to the materiality of the new matter and diligence in its presentation.

The Providence Rubber Co. v. Charles Goodyear, 9 Wall 805, 19 L. ed. 828;
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Suhor v. Gooch, 248 F. 870, 871 (C. C. A. 4), cert. denied 62 L. ed. 1245;
Irvin v. Buick Motor Co., 88 F. (2) 947 (C. C. A. 8), cert. denied 81 L. ed. 1357.

III.

Petitioner relies upon its assertion (p. 7 of Pet. brief) that the Eighth Circuit in this case (153 F. [2] 231), is in conflict with the Sixth Circuit's decision in Egry Register Co. v. Standard Register Co., 1 F. (2) 11, 12. But that case is not in point and besides the Sixth Circuit Court of Appeals affirmed the District Court's dismissal of the bill of review.

IV.

The decisions uniformly hold that where a trade name is not deceptive and the manufacturer has no part in the substitution, then the manufacturer is not responsible for the acts of retailers.

Sir Peter Coats et al. v. Merrick Thread Co. et al., 149 U. S. 562, 37 L. ed. 847;
Kellog v. National Biscuit Co., 305 U. S., l. c. 120-121, 83 L. ed. 79;
Rathbone, Sard & Co. v. Champion Steel Range Co., 189 F. 26 (C. C. A. 6);
Nu Grape Co. v. Glazier, 22 F. (2) 596 (C. C. A. 5);
American Photographic Publishing Co. v. Ziff-Davis Publishing Co., 135 F. (2) 569 (C. C. A. 7).

ARGUMENT.

I.

Mr. Chief Justice Taft, in speaking of the general rule applicable to petitions for leave to file a bill of review, in the case of **Toledo Scale Company v. Computing Scale Co.**, 261 U. S. 399, l. c. 425, 67 L. ed. 719, l. c. 730, quoted with approval the observation of Mr. Justice Story in Ocean Ins. Co. v. Fields, 2 Story 59, Fed. Cas. 10406:

> "It is for the public interest and policy to make an end to litigation; but, as was pointedly stated by a great jurist, that suits may not be immortal while men are mortal."

That remark is apropos here. The original case here was tried at great length in the District Court. Judge George H. Moore, on June 29, 1944, dismissed plaintiff's bill. That was affirmed on April 26, 1945, by the Circuit Court of Appeals (8th Circuit), 148 F. (2) 909. Thereafter, motion for rehearing was denied. Petition for certiorari was denied by this Court on October 8, 1945, 90 L. ed. 28. In November, 1945, plaintiff filed its petition for leave to file a bill of review. On February 4, 1946, the Circuit Court of Appeals (8th Circuit) denied the petition, 153 F. (2) 231 (R. pp. 73-78). Motion for rehearing was denied. Now, for the second time, plaintiff is before this court seeking permission to retry this case after it is Res Judicata.

The pretext used by petitioner in an effort to reopen the case was so flimsy that the 8th Circuit Court of Appeals would have found the same result had it used the obiter dictum of the 6th Circuit quoted by petitioner from **Egry Register Co. v. Standard Register Co.**, 1 F. (2) 11, 12.

This Court in a patent case, **Layne & Bowler Corporation v. Western Well Works**, 261 U. S., l. c. 392-393, 67 L. ed. 714, where a writ of certiorari was improvidently granted, said:

> "It is manifest from this review of the conclusions in the two circuits as to the validity of the Layne patent and the proper construction to be put upon the 9th, 13th and 20th claims, that they were really in harmony, and not in conflict, and that there was no ground for our allowing the writ of certiorari to add to an already burdened docket. If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals. The present case certainly comes under neither head."

Neither does this case.

With equal force it may be said here that to allow a party to come into court again and again after decision, with a claim of newly discovered evidence would offend the doctrine so forcibly expressed by Mr. Justice Field in **Stark v. Starr**, 94 U. S. 477-485, 24 L. ed. 276-278, where it was said:

> "It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit if the first fail. There would be no end to litigation if such a practice were permissible."

The above quotation and a citation from **Southern Pacific R. Co. v. U. S.**, 168 U. S., at page 65, 18 S. Ct. 18, 42

L. ed. 355, are found in **Bresnahan et al. v. Tripp Giant Leveller Co.**, 99 Fed., l. c. 283-284 (1st C. C. A.).

In concluding its thought on the subject the First Circuit, at page 285, made the observation that—

> "The decisions (and there are many) all go at least to the extent of saying that the new evidence, to warrant it, must be so cogent and persuasive as to impress the court with the conviction that, if it had been presented and considered on the original hearing, it would have clearly produced a contrary conclusion from the end there reached."

II.

The petition for leave to file a bill of review is like a motion for new trial. **Suhor v. Gooch**, 248 F. 870, 871 (4 C. C. A.), cert. denied 62 L. ed. 1245. It is addressed to the sound discretion of the court.

> Toledo Scale Co. v. Computing Scale Co., 261 U. S., l. c. 420, 67 L. ed., l. c. 728;
> National Brake & Electric Co. v. Christensen, 254 U. S. 425, 65 L. ed. 341, 343.

Thus, it was recently held by this Court in **U. S. v. William R. Johnson**, Feb. 2, 1946, 90 L. ed., l. c. 391, in a case where a litigant sought a new trial charging perjury of a witness. The district court overruled the motion for a new trial. The Circuit Court of Appeals reversed and this Court reversed the Circuit Court of Appeals, saying:

> "but it is not the province of this court or the Circuit Court of Appeals to review orders granted or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact (citing cases). While the Appellate Court might intervene when the findings of fact are wholly unsupported by evidence (citing cases) it should never do so where it does not clearly appear that the findings are not supported by any evidence."

This is stronger language than used by the 8th Circuit Court of Appeals in this case.

This Court in **National Brake v. Christensen,** 254 U. S. 425-430, 65 L. ed., at page 343, after citing a number of cases, again said that such applications are addressed to the sound discretion of the appellate tribunal and should be decided upon considerations addressed to the materiality of the new matter and diligence in its presentation.

This is the rule formerly, as well as presently, stated by the Eighth Circuit.

Atchison, T. & S. F. Ry. v. U. S., 106 F. (2) 899;
Irvin v. Buick Motor Co., 88 F. (2) 947, Cert. and rehearing denied 81 L. ed. 1357;
Obear Nester Glass Co. v. Hartford Empire Co., 61 F. (2) 31.

III.

An examination of **Egry Register Co. v. Standard Register Co.,** 1 F. (2) 11, 12 (6th C. C. A.), upon which case petitioner relies so heavily, reveals that the phrase "The rule is that, whenever the right to file a bill is at all doubtful, leave is granted as a matter of course" is at best **Obiter Dictum.** The language had no relation or any application to the issue before the court. It had no connection, even remotely, with the decision. The Sixth Circuit affirmed the District Court's dismissal of the bill of review. Upon reading the whole paragraph, the sentence appears to be an interpolation carelessly thrown in where it had no place and a matter of no importance. It may aptly be said that in emphasizing that case petitioner is attempting to make a mountain out of a mole hill.

As to the decisions of the Third Circuit, to which petitioner alludes, it is to be noted that in **Raffold Process Corp. v. Castanea Paper Co.,** 105 F. (2) 126, the Court denied petitioner leave to file bill of review. In **Pittsburgh**

Forgings Co. v. American Foundry Equipment Co., 119 F. (2) 619, the Court does not favor us with any statement of facts upon which its utterance may be predicated.

IV.

The uniform line of decisions hold that where a trade name is not deceptive and the manufacturer has no part in the substitution, then the manufacturer or distributor is not responsible for the acts of retailers.

Sir Peter Coats, et al. v. Merrick Thread Co. et al., 149 U. S. 562, 37 L. ed. 847;
Kellog National Biscuit Co., 305 U. S., l. c. 120-121, 83 L. ed. 79;
Rathbone, Sard & Co. v. Champion Steel Range Co., 189 F. 26 (C. C. A. 6);
Nu Grape Co. v. Glazier, 22 F. (2) 596 (C. C. A. 5);
American Photographic Publishing Co. v. Ziff-Davis Publishing Co., 135 F. (2) 569 (C. C. A. 7).

The real respondent in this case from its inception was and is the Orange Smile Sirup Co. It is the manufacturer of the Cheer Up extract used by bottlers to make the finished product. It is the owner of the Cheer Up trade name. The other respondents are nominal and only incidental to the issue.

Nowhere in petitioner's affidavits was the Orange Smile Sirup Co. charged with substitution or having knowledge thereof, directly or indirectly acquired, of any retailer, as alleged, substituting Cheer Up for 7 up.

No charge was made in the affidavits that any Cheer Up bottler substituted, or had knowledge of any substitutions by retailers. The respondent Orange Smile Sirup Co. sells only to franchise bottlers. The bottlers sell to retailers. Therefore, the alleged substitutions were to have been committed by retailers who were twice removed from the respondent Orange Smile Sirup Co.

V.

Comment On Petitioner's Statement.

Petitioner, on page 4 of his brief, states that the Eighth Circuit Court of Appeals, in the original case, 148 F. (2) 909, in affirming the dismissal of the complaint by the District Court, "commented with some repetition upon the absence of evidence of palming off and confusion and drew inferences from the absence of evidence on the point." No such inference can be drawn when the whole opinion is read. Petitioner omitted reference to the following language, at page 912 of the opinion:

> "When we compare the appearance of the marks, we see no deceptive similarity, and the pronunciation is unlike. We are impressed, the contrast is more striking than the similarity."

and at page 913:

> "The difference in appearance between the competing packages is sufficiently distinctive to identify each of them and to avoid any reasonable probability of confusion. This is all the law requires. The defendants are not required in equity, to insure plaintiff against confusion by careless purchasers."

Petitioner also ignores the conclusions of the court at pages 912 and 913:

> "We cannot see probability of confusion or deception resulting from the concurrent marketing of the two packages in the same territory."

Petitioner makes the bald statement (brief p. 5):

> "The investigation covered several cities in several states. The results were amazing; approximately one-half of respondents' dealers who were sampled, delivered or served defendant's 'Cheer Up' without explanation when '7 up' was ordered."

First, the word "dealers" is too broad. It implies a relationship with the real respondent. There is no contact or relationship with that respondent and the retailers. Next, not one of the investigators, nor one of the 7 up salesmen, was in the slightest manner confused or misled. Each one, in fact, sought to get a product other than 7 up. The 7 up employees (R. 28, 29) studiously and with foreknowledge went to places that did not have 7 up and then asked for it (Affidavits, R. 68-72).

Petitioner complains (brief pp. 5-6) of the findings of the Circuit Court of Appeals (R. 73 et seq.) to the effect that "the exercise of reasonable diligence would have suggested an investigation of facts prior to the trial." However, the Circuit Court of Appeals promptly said—

> "but, had the evidence now available been discovered and offered upon the trial, it would not have affected the result."

To this last statement of the court, petitioner also objects on the grounds it is a usurpation of the jurisdiction of the District Court. But, that statement of the court is amply supported by the decisions of this Court and the Circuit Courts of Appeals.

> Providence Rubber Co. v. Goodyear, 9 Wall. 805, 19 L. ed. 828;
> Carson v. American Smelting & Refining Co., 11 F. (2) 766, 771 (C. C. A. 9).

Petitioner also dislikes the Eighth Circuit's expression that:

> "The professional investigators employed by the petitioner * * * were not deceived."

That was an irrefutable observation. On the face of the purported investigation, the investigators could not have been deceived.

Likewise, petitioner dislikes the court's statement "their reports are disputed". Of course they were disputed by respondent because the affidavits offered by complainant were incorrect and in some instances false. Petitioner was misled by its own investigators. "Professional detectives have, to some extent, prepared complainant's case; they do not always limit their labors to a mere discovery of the actual facts, but, not infrequently, attempt to make a case." Moore on Facts, Vol. 2, page 1167, citing cases.

The so-called investigations in many instances were made in retail establishments which petitioner knew in advance did not carry 7 up (R. 69).

The Atlantic City bottler of Cheer Up (R. 67) never used the 7 oz. bottle, upon which plaintiff claimed infringement, but only sold Cheer Up in 24 or 32 oz. bottles.

The Erie, Pa., Cheer Up bottler (R. 67), because of the sugar shortage had not bottled Cheer Up in 7 oz. bottles since June 15, 1945 and only used the large 24 oz. bottles. Plaintiff's investigation was made in Erie on September 12, at a time when Cheer Up in 7 oz. bottles could not be had in Erie. In two instances where substitution was alleged, the retailers never at any time handled Cheer Up. This was orally reported to the Circuit Court of Appeals during argument as the affidavits came in too late for printing.

Certainly the Circuit Court of Appeals does not consider such petition and affidavits ex-parte and then gullibly believe what had been submitted. This Court and the Circuit Courts of Appeals have uniformly held that the consideration and action upon a petition for leave to file a bill of review is addressed to the **sound discretion** of the appellate tribunal.

National Brake & Electric Co. v. Christensen, 254 U. S. 425, 41 S. Ct. 154, 156, 65 L. ed. 341;
Obear-Nester Glass Co. v. Hartford Empire Glass Co., 61 F. (2) 31, 34 (C. C. A. 8).

In **150 A. L. R. 676**, we find that:

> "The function of a bill of review is the prevention of a miscarriage of justice; and the bill will be allowed only in furtherance of that object and with caution. In other words, the power of a court to allow a bill of review is to be exercised cautiously and sparingly and only under circumstances demonstrated to be indispensable to the merits and justice of the cause. Leave to file will not be granted where the court is satisfied that upon the case offered to be made out the decree ought to be the same as has already been given. 19 Am. Jur., Equity, p. 292, sec. 425; p. 294, sec. 428; and p. 301, sec. 439".

Petitioner claims (pages 1, 12, 13 of its brief) that the Eighth Circuit in this case has departed from its "reasonable probability rule," which rule petitioner says (pp. 13 and 14) was stated in

> Irvin v. Buick Motor Co., 88 F. (2) 947, 951, Cert. denied 81 L. ed. 1357;
> Obear-Nester Glass Co. v. Hartford Empire Glass Co., 61 F. (2) 31, 34;
> Atchison, T. & S. F. v. U. S., 106 F. (2) 899, 902.

Petitioner in an effort to support its statement of the Eighth Circuit's departure from the "reasonable probability rule" has characteristically lifted one sentence in the 7 up v. Cheer Up decision, 153 F. (2) 232 (R. 76), to-wit:

> "The allowance by an appellate court of a petition for permission to file a bill of review in the trial court is addressed to the sound judicial discretion of the court and should be exercised cautiously and sparingly and only in cases where it is clearly demonstrated that the interests of justice will undoubtedly be served thereby."

Again neglecting the paragraph preceding the above quotation wherein the court said:

> "The rules controlling our decision are not in any serious dispute. The law has been reviewed by this court in three comparatively recent decisions: Obear-Nester Glass Co. v. Hartford Empire Co., 8 Cir., 61 F. (2) 31; Hagerott v. Adams, 8 Cir., 61 F. (2) 35, certiorari denied 288 U. S. 599, 53 S. Ct., 317, 77 L. ed. 975; and Hagerott v. Adams, 8 Cir., 70 F. (2) 352. In so far as material these cases and authorities cited and relied upon therein hold that," etc.

The court then continued with its opinion, thus showing that the rule in the above cited cases was adopted in the present case.

The words used in 7 up v. Cheer Up and those in Obear-Nester Glass Co. v. Hartford Empire Co. are almost identical. The court in the Obear-Nester case in referring to a bill of review, p. 34, said:

> "Its allowance rests in a sound judicial discretion to be exercised cautiously and sparingly in cases where it is clearly demonstrated that the interests of justice will undoubtedly be served thereby (citing U. S. Supreme Court cases)."

The same language in the 7 up v. Cheer Up case is quoted by petitioner (brief p. 2) in an effort to show that in that case the 8th Circuit departed from what petitioner refers to as the "reasonable probability rule", after admitting that the 8th Circuit in the Obear-Nestor case followed the "reasonable probability rule" (brief p. 14).

Hazel Atlas Glass Co. v. Hartford Empire Co., 322 U. S. 238, is liberally cited in the footnotes and elsewhere in petitioner's brief (pp. 2, 3, 6, 7, 11, 13) in an effort to support petitioner's various statements. That case involved fraud upon the Court in a patent case. It is not

helpful to either petitioner or respondent. Baseball scores would be just as enlightening for they have no more relation to the issue here than the Hazel Atlas case.

Respondent cannot quite fathom the purpose of petitioner, or the inference intended by its reference to respondent's counsel on pages 4 and 5 of petitioner's brief. Counsel "admitted" nothing in his oral argument. He "asserted" that when the Circuit Court of Appeals handed down its opinion in the original case, 148 F. (2) 909, he prepared for respondent a circumspect and abstract statement of the court's decision. This was mailed to respondant's bottlers. This is as it should be. They had a vital interest in the case. Why the petitioner started its purported investigation within a few days after the decision is not clear. Certainly it had nothing to do with respondent's letters to its bottlers for they had not yet gone out. In all events, petitioner's statement is unwarranted. It is possibly a sly effort at innuendo.

VI.

A Review of the Cases Relied Upon and Cited by Petitioner.

An examination of the cases cited by petitioner reveals that certiorari was denied in these cases:

Irvin v. Buick Motor Co., 88 F. (2) 947 (C. C. A. 8), cert. denied 81 L. ed. 1357;
Suhor v. Gooch, 248 F. 870 (C. C. A. 4), cert. denied 62 L. ed. 1245.

The Third Circuit in **Raffold Process Co. v. Castanea Paper Co.**, 105 F. (2) 619, relied on by petitioner, notwithstanding the language used, denied leave to file the bill of review.

In the case of **Egry Register Co. v. Standard Register Co.**, 1 F. (2) 11, the 6th Circuit affirmed the dismissal of the bill of review by the District Court.

Petitioner attempts to find an admission by this court in the majority opinion in **Hazel Atlas Glass Co. v. Hartford Empire Co.**, 322 U. S. 238, l. c. 248, 88 L. ed. 1250, as to lack of uniformity in the Circuits. Such deduction cannot be made out of the Court's language. Petitioner then quotes from Mr. Justice Roberts dissent. However, Mr. Justice Roberts also said, l. c. 1264:

> "On the strongest grounds of public policy, bills of review are disfavored, since to facilitate them would tend to encourage fraudulent practices, resort to perjury, and the building of fictitious reasons for setting aside judgments."

Should petitioner's idea prevail (and it is contrary to the established rule of law), then, any losing party having pursued his case unsuccessfully to the Supreme Court has the right to start all over again. All he has to do is to file a petition for leave to file a bill of review, supported by flimsy affidavits, and then, under petitioner's theory, the Circuit Court of Appeals is required to grant the petition so that he will have the right (brief p. 13) "to summon, examine and cross-examine witnesses, * * *." The case is then back in the District Court. Should the District Court be unimpressed with the new or revamped testimony an appeal is again taken to the Circuit Court of Appeals. Should the Circuit Court of Appeals again affirm then again the party would come to this court with a petition for writ of certiorari. Ad infinitum. By this process a wealthy litigant can use the courts to bring one not so financially situated to the point of exhaustion.

This court's words in **Toledo Scale Co. v. Computing Scale Co.** (page 3 of this brief) and **Stark v. Starr** (page 4 of this brief) are a complete answer to petitioner's fallacious theory.

The 8th Circuit looked to the substance and having the undisputed **discretionary power** under the decisions by this

court, as well as by the circuits, regardless of the language, did reach the right answer under the prevailing rulings. **National Brake v. Christensen,** 254 U. S. 425, 65 L. ed. 341, and in **Providence Rubber Co. v. Charles Goodyear,** 9 Wall. 805, 19 L. ed. 828, where the cases were reviewed back to Story.

The Eighth Circuit in this case has followed, as it should, the rulings of this Court. The petitioner does not submit to this Court any matter of substance, but presumptuously asks the court to grant certiorari for the sole purpose of deciding the figurative difference, if any, between "Tweedle Dee" and "Tweedle Dum."

Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

OLIVER T. REMMERS,
1730 Boatmen's Bank Bldg.,
St. Louis 2, Mo.,
Counsel for Respondents.

DOUGLAS B. REMMERS,
Of Counsel.